No. 1[redacted]

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1918.

NATIONAL BRAKE & ELECTRIC COMPANY,
Petitioner,

vs.

NIELS A. CHRISTENSEN AND ALLIS-CHALMERS COMPANY,
Respondents.

MEMORANDUM FOR GENERAL ELECTRIC COMPANY, AS AMICUS CURIÆ, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

CHARLES NEAVE,
CLARENCE D. KERR,
Solicitors for GENERAL ELECTRIC COMPANY.

The Evening Post Job Printing Office, Inc., 156 Fulton St., N. Y.

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MEMORANDUM FOR GENERAL ELECTRIC COMPANY, AS AMICUS CURIÆ, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The General Electric Company requests leave to file this memorandum in support of the Petition of the National Brake & Electric Company for a writ of *certiorari*.

There have been two cases pending between the same plaintiffs and the same defendant, or its privy, upon the same patent, No. 635,280 of Christensen, and involving substantially the same issues, one[1], the case here at bar, in the Eastern District of Wisconsin, and the other[2] in the Western District of Pennsylvania.

[1] *Niels A. Christensen et al.* v. *National Brake & Electric Co.*
[2] *Niels A. Christensen et al.* v. *Westinghouse Traction Brake Co.*

In the Wisconsin case the patent has been adjudged valid and infringed (Record, p. 12) and an interlocutory decree (Record, p. 11*q*) providing for an injunction and an accounting has been entered.

In the Pennsylvania case the patent has been declared invalid (Record, p. 113) and a final decree has been entered (Record, p. 127) dismissing the bill as to that patent.

The result is that the same patent, No. 635,280, is valid under the decision of the Circuit Court of Appeals of the Seventh Circuit, and is void under the decision of the Circuit Court of Appeals of the Third Circuit, the said decisions being rendered in cases between the same parties or their privies.

FIRST: To avoid the application of the doctrine of *res judicata* the Court of Appeals for the Seventh Circuit in a decision filed in April, 1919 (Record, p. 325), *asserts* that the interlocutory decree (Record, p. 11*q*) entered by the District Court in the Wisconsin case providing for an injunction and an account, is a final decree (except as to the account), and that as such decree was entered prior to the entry of the final decree in the Pennsylvania case, the Wisconsin decree is controlling.

Such a finding disregards the established law that the decree of a District Court sustaining a patent, declaring infringement, and sending the matter to a master to take and state an account of profits and damages, is interlocutory, and not final. This Court in *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536, 545, said:

> "It is equally well settled that a decree * * * in equity establishing the validity of a patent, and referring the case to a master to compute and report the damages, is interlocutory merely. *Barnard* v. *Gibson*, 7 How. 650; *Humiston* v. *Stainthorp*, 2 Wall. 106.
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> "It may be said in general that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministrial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court and for for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final. *Craighead* v. *Wilson*, 18 How. 199; *Beebe* v. *Russell*, 19 How. 283."

In *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 524, where it is said:

> "But under the judicial system of the United States, from the beginning until the passage of the act of 1891 establishing Circuit Courts of Appeals, appeals from the Circuit Courts of the United States, in equity or in admiralty, like writs of error at common law, would lie only after final judgment or decree; and an order or decree in a patent cause, whether upon preliminary application or upon final hearing, granting an injunction, and referring the cause to a master for an account of profits and damages, was interlocutory only, and not final, and therefore not reviewable on appeal before the final decree in the cause."

This Court also in *Ex parte National Enameling Co.*, 201 U. S. 156, 161, 162, clearly laid down the principle that a decree providing for an injunction and an account like that in the present case was an interlocutory decree and was appealable only for exceptional purposes mentioned under section 7 of the then Court of Appeals Act, stating:

> "It will be noticed that the appeal is allowed from an interlocutory order or decree granting or continuing an injunction, that it must be taken within thirty days, that it is given precedence in the appellate court, that the other proceedings are not to be stayed and that the lower court may require an additional bond. Obviously that which is contemplated is the review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree."

Further, the Seventh Circuit Court of Appeals in holding the interlocutory decree was in substance a final decree, not only deliberately ignored the law as laid down by this Court, but also failed to follow its own prior decisions in *David Bradley Manufacturing Co.* v. *Eagle Manufacturing Co.*, 58 Fed. 721, 722 (7th C. C. A.) in which the Court said:

> "The issue here was novelty of invention. The prior interlocutory decree was pleaded either as a bar or as matter more or less conclusive upon the question of

> novelty, or perhaps in invocation of the doctrine of comity. It is immaterial which. If as a bar *the pleading was defective upon the technical ground that the interlocutory decree had not ripened into a final decree, because the damages had not then been assessed.* The validity of the patent had been determined, subject only to the power of the court to change its judgment before final decree. No objection was made to the sufficiency of the pleading when the final decree was stipulated in evidence. We are well satisfied that thereby the appellant waived the defective nature of the pleading, if the pleading is to be treated as a plea of *res adjudicata.*" (Emphasis ours.)

And also in *Brush Electric Co.* v. *Western Electric Co.*, 76 Fed. 761, 764 (7th C. C. A.) the Court said:

> "The decree in the Toledo Case awarded a perpetual injunction, but with an order of reference to a master to ascertain the damages by reason of infringement, and for that purpose the suit, it is conceded, is still pending. It is therefore only an interlocutory decree, and not available as an estoppel in respect to any issue in these suits. *Barnard* v. *Gibson*, 7 How. 650; *Hunniston* v. *Stainthorp*, 2 Wall. 106; *McGourkey* v. *Railway Co.*, 146 U. S. 545, 13 Sup. Ct. 172; *David Bradley Manuf'g Co.* v. *Eagle Manuf'g Co.*, 6 C. C. A. 661, 57 Fed. 980, and 18 U. S. App. 349; *Jones Co.* v. *Munger Improved Cotton Mach. Manuf'g Co.*, 1 C. C. A. 668, 50 Fed. 785, and 2 U. S. App. 188; *Richmond* v. *Atwood*, 2 C. C. A. 596, 52 Fed. 10, and 5 U. S. App. 151; *Marden* v. *Campbell Printing-Press & Manuf'g Co.*, 15 C. C. A. 26, 67 Fed. 809, and 33 U. S. App. 123; *Bissell Carpet-Sweeper Co.* v. *Goshen Sweeper Co.*, 19 C. C. A. 25, 72 Fed. 545."

SECOND: It having been clearly established by this Court in the cases cited above that the Wisconsin decree is interlocutory, it follows inevitably that the Seventh Circuit Court of Appeals should have held that the issues in the case were *res judicata* under the final decree in the Pennsylvania case, and it should have dismissed the bill as to patent 635,280, in accordance with the procedure laid down by this Court in the recent case of

Hart Steel Co. v. *Railroad Supply Co.*, 244 U. S. 294, 299, in which this Court said:

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace', which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect. *Kessler* v. *Eldred, supra.*"

THIRD: The Seventh Circuit Court of Appeals has not given the decree of the Pennsylvania Court full faith and credit as is required by Article IV of the Constitution of the United States and Section 905 Revised Statutes.

In *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 133, after referring to the language of the Constitution and to the Act of Congress giving effect thereto, and to the fact that the decisions of the United States Courts are for the purposes of the Act considered as those of courts of the States, this Court said:

> "The effect of this clause is to put the judgment of a court of one State, when sued upon, or pleaded in estoppel, in the courts of another State, upon the plane of a domestic judgment in respect of conclusiveness as to the facts adjudged."

FOURTH: If the instant decision that a decree such as the Milwaukee decree is final is permitted to stand, it raises a question of vital interest to the industries of the country. The rule which has heretofore obtained has permitted a manufacturer to participate in the defense of a suit brought against a purchaser of devices of his manufacture without concluding him from raising the issues of validity and infringement in a subsequent suit, unless a final decree has been entered in the original suit and he has been shown to be privy to it. *Whittemore* v. *World Polish Mfg. Co.*, 159 Fed. 480. *Australian Knitting Co.* v. *Gormly*, 138 Fed. 92.

Under the instant decision, when an interlocutory decree for an injunction and an account has been entered in a suit against

a purchaser, a manufacturer who has participated in the defense, possibly under adverse conditions and perhaps in a District remote from his domicile, is, upon a showing of privity, bound by the decree and never has his day in Court in his own case because the issues are *res judicata*. Under such an application of the rule the Pennsylvania Court would have bound under the Wisconsin decree to have held the patent valid and to have entered a decree thereon. But the plaintiffs, presumably because the Wisconsin decree was interlocutory, did not raise the question in that suit. If such an adjudication is to be held an absolute bar to the manufacturer, he would practically lose his day in Court or must leave his vendees helpless and unsupported to carry on a losing battle with a patentee on ground chosen by the latter. Every such suit would place a manufacturer upon the horns of such a dilemma.

It is respectfully submitted that the writ of *certiorari* should be granted on the following grounds:

1. Because the Seventh Circuit Court of Appeals has held that an interlocutory decree is a final decree, rendering nugatory the law as established by this Court.

2. Because the Seventh Circuit Court of Appeals has refused to hold the issues of the case *res judicata* under the decree of the Pennsylvania Court.

3. Because the Seventh Circuit Court of Appeals has failed to give full faith and credit to the decree of the Pennsylvania Court.

4. Because the question as to what constitutes a final decree is of the most serious importance to industry and to the public at large, involving as it does practically all patent suits brought against users or purchasers of machinery or commodities.

CHARLES NEAVE,
CLARENCE D. KERR,
Solicitors for General Electric Company.

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MEMORANDUM FOR GENERAL ELECTRIC COMPANY, AS *AMICUS CURIÆ*, IN SUPPORT OF PETITIONER'S POSITION.

The General Electric Company requests leave to file this memorandum in support of the position of the Petitioner National Brake & Electric Company.

BRIEF STATEMENT OF FACTS.

There have been two cases pending between the same plaintiffs and the same defendant, or its privy, upon the same patents Nos. 621,324 and 635,280 of Christensen, and involving substantially the same issues, one,[1] the case here at bar, in the

[1] Niels A. Christensen *et al. v.* National Brake & Electric Co.

Eastern District of Wisconsin, and the other[2] in the Western District of Pennsylvania.

In the Wisconsin case the second patent has been adjudged valid and infringed (Record, p. 41) and an interlocutory decree (Record, pp. 39-40) providing for an injunction and an accounting has been entered.

In the Pennsylvania case the second patent has been declared invalid (Record, pp. 112-114) and a final decree has been entered (Record, p. 115) dismissing the bill as to that patent.

The result is that the second patent, No. 635,280, is valid under the decision of the Circuit Court of Appeals of the Seventh Circuit, and is void under the decision of the Circuit Court of Appeals of the Third Circuit, the said decisions being rendered in cases between the same parties or their privies.

The General Electric Company is particularly interested in the subject matter of this suit, for it has been sued by the respondents herein upon these two patents in two Circuits, the Second and the Seventh (Record, pp. 101-102). The suit in the Second Circuit has been dismissed, but the suit in the Seventh Circuit is still undetermined, although it has been pending since March, 1916. It is therefore of great importance to the General Electric Company to have this Court determine whether or not patent 635,280 is void as issued without warrant of law, as was found by the Court of Appeals for the Third Circuit.

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[2] Niels A. Christensen *et al. v.* Westinghouse Traction Brake Co. [3] 248 Fed. 284.

ARGUMENT.

I. The Decree in the Wisconsin Case was Interlocutory and Not Final.

To avoid the application of the doctrine of *res judicata* the Court of Appeals for the Seventh Circuit in a decision filed in April, 1919 (Record, pp. 256-9), *asserts* that the interlocutory decree (Record, p. 40) entered by the District Court in the Wisconsin case providing for an injunction and an account, is a final decree (except as to the account), and that as such decree was entered prior to the entry of the final decree in the Pennsylvania case, the Wisconsin decree is controlling.

Such a finding disregards the established law that the decree of a District Court sustaining a patent, declaring infringement, and sending the matter to a master to take and state an account of profits and damages, is interlocutory, and not final. This Court in *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536, 545, said:

> "It is equally well settled that a decree * * * in equity establishing the validity of a patent, and referring the case to a master to compute and report the damages, is interlocutory merely. *Barnard* v. *Gibson*, 7 How. 650; *Humiston* v. *Stainthorp*, 2 Wall. 106.
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> "It may be said in general that if the court make a decree fixing the rights and liabilities of the parties, and thereupon refer the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final; but if it refer the case to him as a subordinate court and for a judicial purpose, as to state an account between the parties, upon which a further decree is to be entered, the decree is not final. *Craighead* v. *Wilson*, 18 How. 199; *Beebe* v. *Russell*, 19 How. 283."

In *Smith* v. *Vulcan Iron Works*, 165 U. S. 518, 524, it is said:

> "But under the judicial system of the United States, from the beginning until the passage of the act of 1891

> establishing Circuit Courts of Appeals, appeals from the Circuit Courts of the United States in equity or in admiralty, like writs of error at common law, would lie only after final judgment or decree; and an order or decree in a patent cause, whether upon preliminary application or upon final hearing, granting an injunction and referring the cause to a master for an account of profits and damages, was interlocutory only, and not final, and therefore not reviewable on appeal before the final decree in the cause."

This Court also in *Ex parte National Enameling Co.*, 201 U. S. 156, 161, 162, clearly laid down the principle that a decree providing for an injunction and an account like that in the present case was an interlocutory decree and was appealable only for exceptional purposes mentioned under section 7 of the then Court of Appeals Act, stating:

> "It will be noticed that the appeal is allowed from an interlocutory order or decree granting or continuing an injunction, that it must be taken within thirty days, that it is given precedence in the appellate court, that the other proceedings in the lower court are not to be stayed, and that the lower court may require an additional bond. Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree."

The Seventh Circuit Court of Appeals in its opinion relied on the case of *Forgay* v. *Conrad* as a justification of its position that a decree providing for an injunction and an account was final as to the equities involved, but this Court in the *National Enameling* case, *supra*, has distinguished the finding of that case as follows (pp. 164, 165):

> "In the subsequent case of *Beebe* v. *Russell*, 19 How. 283, in which the rule in reference to the finality of decrees was further considered, it was said, in explanation of the decision in the *Forgay* case (p. 287):
>
> 'In Forgay's case, it (the question) was made upon the decree given by the court below, and it was adjudged

by this court to be final to give this court jurisdiction of it. But it was so, upon the ground that the whole merits of the controversy between the parties had been determined, *that execution had been awarded,* and that the case had been referred to the master merely for the purpose of adjusting the accounts. The fact is, *the order of the court in that case for referring it to a master was peculiar,* making it doubtful, if it could in any way control or qualify the antecedent decree of the court upon the whole merits of the controversy, or modify it in any way, *except upon a petition for a rehearing.*'"

Certainly it cannot be urged that any question as to the scope of the second patent has been finally decided in the present case when the Master has before him fourteen different types of compressors made by defendant, which the plaintiff contends infringe such patent (Record, p. 92). Assuming that the second patent is valid, it is almost inevitable, when the Court has finally passed upon these fourteen devices, that the scope given the second patent by the decision of the Seventh Circuit Court of Appeals will be found to have been either expanded or contracted.

Further, the Seventh Circuit Court of Appeals in holding the interlocutory decree was in substance a final decree, not only deliberately ignored the law as laid down by this Court, but also failed to follow its own prior decisions in *David Bradley Manufacturing Co.* v. *Eagle Manufacturing Co.,* 58 Fed. 721, 722 (7th C. C. A.) in which the Court said:

"The issue here was novelty of invention. The prior interlocutory decree was pleaded either as a bar or as matter more or less conclusive upon the question of novelty, or perhaps in invocation of the doctrine of comity. It is immaterial which. If as a bar, *the pleading was defective upon the technical ground that the interlocutory decree had not ripened into a final decree, because the damages had not then been assessed.* The validity of the patent had been determined, subject only to the power of the court to change its judgment before final decree. No objection was made to the sufficiency

of the pleading when the final decree was stipulated in evidence. We are well satisfied that thereby the appellant waived the defective nature of the pleading, if the pleading is to be treated as a plea of *res adjudicata.*" (Emphasis ours.)

And also in *Brush Electric Co.* v. *Western Electric Co.*, 76 Fed. 761, 764 (7th C. C. A.), the Court said:

> "The decree in the Toledo Case awarded a perpetual injunction, but with an order of reference to a master to ascertain the damages by reason of infringement, and for that purpose the suit, it is conceded, is still pending. It is therefore only an interlocutory decree, and not available as an estoppel in respect to any issue in these suits. *Barnard* v. *Gibson*, 7 How. 650; *Humiston* v. *Stainthorp*, 2 Wall. 106; *McGourkey* v. *Railway Co.*, 146 U. S. 545, 13 Sup. Ct. 172; *David Bradley Manuf'g Co.* v. *Eagle Manuf'g Co.*, 6 C. C. A. 661, 57 Fed. 980, and 18 U. S. App. 349; *Jones Co.* v. *Munger Improved Cotton Mach. Manuf'g Co.*, 1 C. C. A. 668, 50 Fed. 785, and 2 U. S. App. 188; *Richmond* v. *Atwood*, 2 C. C. A. 596, 52 Fed. 10, and 5 U. S. App. 151; *Marden* v. *Campbell Printing-Press & Manuf'g Co.*, 15 C. C. A. 26, 67 Fed. 809, and 33 U. S. App. 123; *Bissell Carpet-Sweeper Co.* v. *Goshen Sweeper Co.*, 19 C. C. A. 25, 72 Fed. 545."

II. The Issues herein are *Res Judicata* under the decree in the Pennsylvania Case.

It having been clearly established by this Court in the cases cited above that the Wisconsin decree is interlocutory, it follows inevitably that the Seventh Circuit Court of Appeals should have held that the issues in the case were *res judicata* under the final decree in the Pennsylvania case, and it should have dismissed the bill as to patent 635,280, in accordance with the procedure laid down by this Court in the recent case of *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U. S. 294, 299, in which this Court said:

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical

time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace', which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect. *Kessler* v. *Eldred, supra.*"

III. *Res Judicata* and the Law of the Case.

The Seventh Circuit Court of Appeals has confused the rule known as the "law of the case" with the doctrine of *"res judicata"*. The former is merely the rule that questions once decided on a particular set of facts, in any particular case, by any particular court, will not be reopened or redecided unless other facts or reasons, subsequently appearing, require a new ruling thereon. The doctrine of *res judicata*, however, provides that when a definite and final decision has been reached in one case the courts will not arrive at a different conclusion in another case between the same parties or their privies, but will accept and enforce that decision. The first is a rule of convenience; the second a matter of substantive law.

IV. The Seventh Circuit Court of Appeals has failed to give full faith and credit to the decree of the Pennsylvania Court.

The Seventh Circuit Court of Appeals has not given the decree of the Pennsylvania Court full faith and credit as is required by Article IV of the Constitution of the United States and Section 905, Revised Statutes.

In *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 133, after referring to the language of the Constitution and to the Act of Congress giving effect thereto, and to the fact that the decisions of the United States Courts are for the purposes of

the Act considered as those of courts of the States, this Court said:

> "The effect of this clause is to put the judgment of a court of one State, when sued upon, or pleaded in estoppel, in the courts of another State, upon the plane of a domestic judgment in respect of conclusiveness as to the facts adjudged."

V. Respondents' Laches.

The course of the respondent Christensen since the very issuance of the first patent has been prejudicial to the application of equitable remedies on his behalf.

1. Patent 621,324 issued on March 21, 1899. After keeping it six months, Christensen sent it back to the Patent Office calling attention to the fact that it contained a fugitive sheet of drawings and demanding another patent. In compliance with his request the Commissioner broke the seal, marking the Patent and Record cancelled, and issued a new patent 635,28 on October 17, 1899 (Record, p. 88). He received what he asked for and he now seeks to avoid the force of his own act by complaining of the "mistake" of the Patent Office.

2. This suit was brought against petitioner on December 1 1906. The answer was filed on March 1, 1907 (Record, p. 26 The Record is silent as to what happened during the intervening years, but the case was heard before the late Judge Quarles who died before deciding it (Respondents' brief, p. 2). The date of Judge Quarles' death was October 7, 1911 (190 Fed., VII), but respondents did not amend their bill until Novembe 12, 1913 (Record, p. 30), when the first patent No. 621,324 was first injected into the case. When justice requires the speedy disposition of a case what excuse can respondents possibly have when they took from 1906 to 1911 to bring the case up for hearing before Judge Quarles and then, after his death, allowed it to stand from October 7, 1911, to November 12, 1913, before making any move and then amended their complaint to bring

in the first patent in suit seven years after the case had been filed?

Nor has the respondents' conduct in the Pittsburgh suit been such as to influence favorably a court of equity. On December 12, 1906, the defendant Westinghouse Traction Brake Company was notified regarding the second patent, but suit was not brought until March 11, 1916 (Record, p. 125).

The General Electric Company received a similar notice of infringement, and suit against it was brought in Chicago on March 13, 1916. Respondents have done nothing in that case since it was filed.

Respondents attempted to discontinue the Pittsburgh case after it became apparent that the decision in that case might jeopardize success in the present case. But when the matter came before the Third Circuit Court of Appeals and the controversy narrowed to a determination of whether or not the second patent 635,280 was issued without warrant of law, the respondents (Record, p. 199)

> "agreed at bar that the merits of the controversy should be heard in reference to the first two patents, and accordingly argument was had thereon. Informally, therefore, but with complete effect, the case is before us as if a *certiorari* had been actually issued and the record returned in obedience thereto. This agreement relieves us from considering any preliminary question concerning procedure, and we turn at once to the dispute concerning the respective validity of the first two patents."

So here the respondents voluntarily submitted themselves to the jurisdiction of the Third Circuit Court of Appeals to permit that Court to decide the question of the validity of the second patent, and having thus submitted their case they cannot now evade the effect of their acts.

Conclusion.

It is respectfully submitted that the Seventh Circuit Cour of Appeals should be directed to order the dismissal of the bil of complaint on the following grounds:

1. That the second patent is void as issued without warran of law.

2. That the holding of the second patent invalid by th Pennsylvania Court is controlling as *res judicat* between petitioner and respondent.

3. That the first patent has no existence in law, the paten having been cancelled and destroyed by respondent' own act.

4. That the continuance of this litigation during the pa fourteen years has been due to respondent's laches.

CHARLES NEAVE,
CLARENCE D. KERR,
Of Counsel for General Electric Company

November 30, 1920.